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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THOMAS CLINTON,

Plaintiff and Appellant,

v.

GREGORY BRENNER,

Defendant and Respondent.

B210011

(Los Angeles County
Super. Ct. No. SC095029)

APPEAL from a judgment (order of dismissal) of the Superior Court of Los Angeles County, Joe Hilberman, Judge. Affirmed.

Thomas Clinton, in pro. per., for Plaintiff and Appellant.

Nemecek & Cole, Jonathan B. Cole, Michael W. Feenberg and Susan S. Baker for Defendant and Respondent.

INTRODUCTION

In pro. per., appellant Thomas Clinton sued respondent Gregory Brenner for legal malpractice arising out Brenner's representation of him at a sentencing hearing. Clinton alleges that Brenner failed to ensure that he was awarded the proper amount of custody credits and that, as a result, he served an unlawfully long sentence before being released. The trial court sustained Brenner's demurrer without leave to amend on two grounds. The first was that Clinton had failed to comply with the requirement that he allege actual innocence of the underlying charges. The second was that the lawsuit was time-barred.

In this appeal, Clinton primarily contends that the actual innocence requirement does not apply to his action because his malpractice allegations do not arise out of representation during the guilt phase of his prosecution, but, instead, arise out of Brenner's representation at the sentencing hearing. We do not discuss or reach the merits of this contention because we conclude that Clinton's action is time-barred. We therefore affirm the judgment (order of dismissal).

FACTUAL AND PROCEDURAL BACKGROUND

On March 13, 2003, Clinton, represented by alternate deputy public defender William Monterroso, pled nolo contendere to two charges of sale of a controlled substance (Health & Saf. Code, § 11379, subd. (a)) and one charge of possession of a controlled substance (Health & Saf. Code, § 11378) and admitted two enhancements that he had committed the crimes while released on bail or his own recognizance (Pen. Code, § 12022.1). The trial court imposed but then suspended an aggregate sentence of nine years and eight months. The court placed Clinton on probation on various conditions, including that he serve 365 days in jail. Clinton received credit for time served of 315 days (211 actual days served and 104 local conduct credits).

In May 2003, Clinton's probation was revoked and a formal probation violation hearing was set. In July 2003, Clinton, represented by court-appointed counsel Ronald Levine (Pen. Code, § 987.2), stipulated that he had violated probation. The matter was set for sentencing.

Private counsel Brenner (defendant in this action and respondent on appeal) represented Clinton at the August 22, 2003 sentencing hearing. The original sentence (nine years and eight months) was "placed in full force and effect." The court's minutes reflect that Clinton was given total custody credits of 315 days.

While in prison, Clinton filed, in pro. per., a petition for writ of habeas corpus. Although the record on appeal does not include the petition, it does include the trial court's order, filed on June 9, 2005, summarily denying the petition. The order indicated that the petition was denied because, among other things, Clinton had failed to meet his burden of establishing that he had been prejudiced by ineffective assistance of trial counsel.

Thereafter, it appears that Clinton filed another motion with the trial court. The record does not include the motion but it does include an August 18, 2005 letter from the superior court to Clinton stating: "Per Judge Stone ordered: Please re-submit the last motion that you've sent recently regarding the credit of jail time to this court. We will respond back to you promptly. Thank you."

On June 30, 2006, the trial court issued an amended abstract of judgment to reflect an award of total custody credits of 681 days (455 actual days served and 226 local conduct credits). The record contains no explanation as to why the court issued the amended judgment at that time other than the notation in the court's minutes that "nunc pro tunc [was ordered] prepared 6-30-06, by Beth Filosa. It appearing to the court that through inadvertence and clerical error the minute order of 8-22-03, does not properly reflect the court's order. Said minute order is amended nunc pro tunc as of that date as follows: to delete [original custody credit

award and] to substitute: defendant given total credit 681 days in custody additional 455 days actual custody and additional 226 days good time/work time.”

On August 17, 2006, Clinton was released from prison on parole.

On October 25, 2006, Clinton, still in pro. per., filed an “amended” habeas corpus petition raising multiple claims. Insofar as is relevant to this appeal, he alleged that as a direct result of counsel’s ineffective assistance, he had been given insufficient custody credits and therefore had served a sentence longer than legally required. The trial court issued a minute order stating: “The court finds that the court has previously ruled on [Clinton’s] request. See previous rulings.”

On August 22, 2007, Clinton filed, in pro. per., the present lawsuit against Brenner. The operative pleading is the second amended complaint, filed in 2008. In general, Clinton alleges that it was Brenner’s obligation at the August 22, 2003 sentencing hearing “to protect his clients [*sic*] credits to be applied toward his client’s prison sentence, and to reduce the prison sentence as much as possible.” In specific, he alleges that Brenner “did not protect 2196 days to be applied toward [Clinton’s] sentence, and which cause[d] 2196 additional days to be served in prison and past his approximate eight month prison term.” During these 2,196 days, Clinton alleges that he was sexually assaulted and harmed in other ways. Clinton does not explain why he was due an additional 2,196 days (almost six years) in custody credits or why he had only an eight-month term. Although his pleading alleges that the 2,196 days constituted the difference between two abstracts of judgment, those judgments were neither identified nor attached. In fact, the difference between the original 2003 judgment (315 custody credits) and the 2006 amended abstract of judgment (681 custody credits) is only 366 days. In regard to the statute of limitations, Clinton, relying upon Code of Civil Procedure section 340.6, alleges that he “qualifie[d] for equitable tolling to the one year statute to sue his private attorney [Brenner]. He was restricted due to

imprisonment that kept him from acquiring the court forms and transcripts to file suit, and has a disability that prevented him from going to Beverly Hills Superior Court to acquire the necessary documents to file suit.”

Brenner demurred to the second amended complaint on multiple grounds. Primarily, Brenner urged that Clinton’s legal malpractice allegations were insufficient as a matter of law because Clinton did not and could not allege that he was actually innocent of the underlying criminal charges. Secondly, Brenner urged that Clinton’s action was time-barred and that the trial court’s denials of Clinton’s petitions for habeas corpus collaterally estopped Clinton from relitigating any claim of professional negligence.

The trial court sustained the demurrer without leave to amend and dismissed the action. It explained that “in order to substantiate a claim for legal malpractice in the context of a criminal conviction, Plaintiff is required to plead innocence and post-conviction exoneration. [Citation.] The court finds based on [Clinton’s] entry of a plea of nolo contendere, he is unable to make such allegations and is therefore unable to allege facts sufficient to constitute a cause of action for legal malpractice. . . . [¶] Further, even if [Clinton were] able to plead actual innocence as a necessary element to his claim for legal malpractice, his claim would be barred by the statute of limitations. CCP § 340.6. The tolling provisions contained within that statute do not extend the time to file such an action long enough for the complaint to be considered timely filed. Moreover, the equitable tolling doctrine does not apply to claims for legal malpractice.”

This pro. per. appeal by Clinton follows.

DISCUSSION

Section 340.6¹ contains the statute of limitations for a legal malpractice action. Subdivision (a) provides that the action “shall be commenced within one year after the plaintiff [here, Clinton] discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the follow exist: [¶] . . . [¶] (4) The plaintiff is under a legal or physical disability which restricts the plaintiff’s ability to commence legal action.”

Here, Clinton alleges that the wrongful act occurred on August 22, 2003 at his sentencing hearing when Brenner failed to request an accurate award of conduct credits. Consequently, the first issue is when Clinton discovered or could have reasonably discovered that misfeasance. The record is not clear on that point. Arguably, Clinton had discovered Brenner’s failure no later than the day in 2005 (sometime before June 9, 2005) when he filed his first habeas corpus petition alleging ineffective assistance of counsel. However, we do not know the specifics of the claims raised in that petition because the petition is not included in the record on appeal. We therefore give Clinton the benefit of the doubt and conclude that he did not discover the malpractice until the trial court issued its nunc pro tunc order on June 30, 2006 indicating that he had not been awarded the correct amount of custody credits. Clinton apparently did not receive a copy of that order until August 1, 2006. However, there is no need to decide if Clinton’s malpractice action accrued on June 30 (constructive knowledge) or August 1 (actual knowledge) because in either circumstance, the limitations period was tolled since

¹ All undesignated statutory references are to the Code of Civil Procedure.

he was incarcerated at the time of accrual. In that regard, section 352.1, subdivision (a) provides: “If a person entitled to bring an action, . . . is, at the time the cause of action accrued, imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life, the time of that disability is not a part of the time limited for the commencement of the action, not to exceed two years.” Consequently, the one-year period to bring suit did not begin to run until Clinton was paroled on August 17, 2006. But Clinton did not file his action until August 22, 2007, past the one-year deadline. The lawsuit is therefore time-barred.

Clinton advances two distinct arguments to argue for a contrary conclusion. The first is that the limitations period was *also* tolled for a short period after he was released from prison because he was physically disabled. The second is that the doctrine of equitable tolling renders his action timely filed. Neither argument is persuasive.

First, Clinton relies upon subdivision (a)(4) of section 340.6 which provides that the statute of limitations is tolled while the “plaintiff is under a legal or physical disability which restricts [his] ability to commence legal action.” (See also section 357 [“No person can avail himself of a disability, unless it existed when his right of action accrued”].) In that regard, Clinton repeats an argument he made unsuccessfully to the trial court. He urged that following his August 17, 2006 release from prison, he suffered from a physical disability which limited his ability to file suit. He had claimed that it was not until September 5, 2006 that he was physically able to go to the Beverly Hills Superior Court and obtain the documents necessary to begin litigation so that he had one year from that date (e.g., until September 5, 2007) to file suit. Clinton argued that following being paroled, he was “‘dumped’ out on skid row, homeless, no money or transportation, and disabled. During the struggle just to survive, when he [was] worrying about his

next meal or [where] he will sleep, [it was unreasonable to require him to] drop everything, walk approximately 25 miles to Beverly Hills Superior Court on his disabilities, and diligently begin his suit.” The only evidence Clinton offered to support his claim of physical disability (what he characterized as “a well documented lower leg disability”) was an unauthenticated two-page prison form entitled “Disability Placement [undecipherable] Verification” by which he claimed a physical disability of mobility impairment. The form is dated June (possibly 2006) but the handwritten physician comments on page one are not legible. The second page is completely illegible.

The trial court rejected Clinton’s theory of tolling based upon physical disability. It explained: “[Clinton] . . . argues that his ‘disabilities’ prevented him from getting to the courthouse in Beverly Hills to obtain documents in support of his theory of legal malpractice against [Brenner] until September 5, 200[6]. [Clinton] argues in his opposition to the demurrer that he was “‘dumped” out on skid row, homeless, no money or transportation, and disabled.’ Yet, he provides no evidence or any other indication that he was actually physically disabled. [Clinton] has seemingly described himself as indigent, not disabled, and therefore unable to get to the courthouse. Such indigence is not defined as a physical disability under the Americans with Disabilities Act. See 42 U.S.C. § 12102(2). Thus, the statute of limitations does not toll on account of any physical disability.” We agree with the trial court’s ruling.

Clinton’s second argument relies upon the theory of equitable tolling. The doctrine of equitable tolling has three elements: “(1) the plaintiff must have diligently pursued his or her claim; (2) the fact that the plaintiff is left without judicial forum for resolution of the claim must be attributable to forces outside the control of the plaintiff; and (3) the defendant must not be prejudiced by application

of the doctrine.” (*Hull v. Central Pathology Service Medical Clinic* (1994) 28 Cal.App.4th 1328, 1336.)

The apparent basis of Clinton’s equitable tolling claim is the fact that on August 21, 2006, he initiated a federal civil rights action, pursuant to 42 United States Code section 1983, against Brenner which he pursued until it was dismissed on March 21, 2007 for failure to allege that Brenner was acting under color of state law. According to Clinton, the statute of limitations was tolled while he litigated his federal claim. (See, e.g., *Addison v. State of California* (1978) 21 Cal.3d 313, 317-319.) We need not reach the merits of Clinton’s argument because it is settled that the doctrine of equitable tolling does *not* apply to legal malpractice actions. “The question of whether the doctrine of equitable tolling applies to section 340.6 is a matter of statutory construction. In determining legislative intent, the reviewing court ‘look[s] first to the words of the statute, giving them their usual and ordinary meaning.’ [Citation.] The California Supreme Court, however, has already spoken regarding the exclusivity of the tolling provisions enumerated in section 340.6. In *Laird v. Blacker* [(1992)] 2 Cal.4th at page 618, it explained: ‘Section 340.6, subdivision (a) states that “in no event” shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature *expressly intended to disallow tolling under any circumstances not enumerated in the statute[, including equitable tolling].*’” (*Gordon v. Law Offices of Aguirre & Meyer* (1999) 70 Cal.App.4th 972, 979; accord *Rose v. Hudson* (2007) 153 Cal.App.4th 641, 655-656 and *Bledstein v. Superior Court* (1984) 162 Cal.App.3d 152, 156-160.)

DISPOSITION

The judgment (order of dismissal) is affirmed. The parties are to bear their own costs.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.